
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 10-15387

SAMUEL MICHAEL KELLER,

Plaintiff and Appellee,

v.

ELECTRONIC ARTS INC.,

Defendant and Appellant.

On Appeal from an Order of the United States District Court
for the Northern District of California,
The Honorable Vaughn R. Walker
Case No. 3:09-CV-01967-VRW

**MOTION FOR LEAVE TO SUBMIT VIDEO-GAME
CONSOLE, CONTROLLERS AND VIDEO GAMES AT ISSUE
IN APPEAL**

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**Motion for Leave to Submit Video-Game Console, Controllers, and
Video Games at Issue in Appeal**

Pursuant to Federal Rule of Appellate Procedure 27, defendant-appellant Electronic Arts Inc. (“EA”) respectfully moves for leave to submit a Sony Playstation 2 video-game console, memory card and controllers, as well as the 2006, 2007, 2008, and 2009 editions of EA’s *NCAA Football* and *NCAA Basketball/March Madness* video games, to the Clerk of Court for the Court of Appeals for the Ninth Circuit for distribution to the assigned panel in this appeal. Alternatively, pursuant to Circuit Rule 11-4, EA respectfully requests that the Court request transfer of these materials from the district court, where they were submitted as part of EA’s request for judicial notice in connection with its special motion to strike under California’s anti-SLAPP statute.

This appeal arises from the district court’s February 8, 2010 Order on Defendants’ Motion to Dismiss and Electronic Arts’ Anti-SLAPP Motion to Strike.¹ In support of its special motion to strike under California’s anti-SLAPP statute, Code of Civil Procedure Section 425.16, EA submitted to the district court copies of the video games that are referred to and form the basis of plaintiff-appellee Samuel Keller’s complaint, including *NCAA Football 2006*, *NCAA Football 2007*, *NCAA Football 2008*, *NCAA Football 2009*, *NCAA March Madness 2006*, *NCAA March Madness 2007*, *NCAA March Madness 2008*, and *NCAA Basketball 2009*. EA also provided the district court with a Sony Playstation 2 video-game console, a memory card and two controllers, so that the

¹ A copy of the district court’s order is attached as Exhibit A.

court could review the contents of these video games. *See* Ex. A at n.2; *see also* *E.S.S. Entm't 2000, Inc. v. Rock Star Videos*, 444 F. Supp. 2d 1012, 1016 n.10 (C.D. Cal. 2005) (declining to take judicial notice of content of video game that formed basis of plaintiff's complaint because defendant failed to provide court with video-game console and controllers for viewing games). EA provided the district court with a Sony Playstation 2 video-game console because it is the gaming platform compatible with all annual editions of the games identified in Plaintiff's complaint.

The district court granted EA's Request for Judicial Notice of the video games. *See* Ex. A at n.2 (“[b]ecause Plaintiff refers to the video games in his complaint, the Court GRANTS EA's request for judicial notice of them”). Moreover, the district court's Order relies upon and specifically discusses the content of the video games submitted by EA. *See id.* at 9-10, 12, 13.

Accordingly, EA respectfully requests leave to submit to this Court the same materials that it submitted to the district court, which are part of the record on appeal: namely, the video-game console, controllers, and video games described above and in the district court's Order. EA proposes to package these materials with the standard manufacturer's instructions for use of the game console and controllers, and to deliver them to the Clerk's Office in San Francisco.

Alternatively, EA respectfully requests pursuant to Circuit Rule 11-4 that the Court request transfer of these materials from the district court.²

Respectfully submitted,

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² If this Court would like two additional sets of the materials, EA would be happy to provide them. EA also is willing to provide the Court with technicians to set up the consoles and/or to demonstrate the game.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAMUEL MICHAEL KELLER, on behalf of
himself and all others similarly
situated,

Plaintiff,

v.

ELECTRONIC ARTS, INC.; NATIONAL
COLLEGIATE ATHLETICS ASSOCIATION; and
COLLEGIATE LICENSING COMPANY,

Defendants.

No. C 09-1967 CW

ORDER ON DEFENDANTS'
MOTIONS TO DISMISS
(Docket Nos. 34, 47,
48) AND ELECTRONIC
ARTS' ANTI-SLAPP
MOTION TO STRIKE
(Docket No. 35)

Defendants Electronic Arts, Inc. (EA), the National Collegiate Athletics Association (NCAA) and the Collegiate Licensing Company (CLC) move separately to dismiss Plaintiff Samuel Michael Keller's claims against them. EA also moves to strike Plaintiff's claims against it pursuant to California Civil Code section 425.16 (Docket No. 35). Plaintiff opposes the motions. As amici curiae, James "Jim" Brown and Herbert Anthony Adderley filed a brief in opposition to EA's motion to dismiss. The motions were heard on December 17, 2009. Having considered all of the papers submitted by the parties, the Court DENIES EA's Motion to Dismiss (Docket No. 34), GRANTS NCAA's Motion in part and DENIES it in part (Docket No. 48), DENIES CLC's Motion (Docket No. 47) and DENIES EA's Motion to Strike (Docket No. 35).

BACKGROUND

Plaintiff is a former starting quarterback for the Arizona

1 State University and University of Nebraska football teams.

2 EA, a Delaware corporation with a principal place of business
3 in California, develops interactive entertainment software. It
4 produces, among other things, the "NCAA Football" series of video
5 games. In the games, consumers can simulate football matches
6 between college and university teams. Plaintiff alleges that, to
7 make the games realistic, EA designs the virtual football players
8 to resemble real-life college football athletes, including himself.
9 He claims that these virtual players are nearly identical to their
10 real-life counterparts: they share the same jersey numbers, have
11 similar physical characteristics and come from the same home state.
12 To enhance the accuracy of the player depictions, Plaintiff
13 alleges, EA sends questionnaires to team equipment managers of
14 college football teams. Although EA omits the real-life athletes'
15 names from "NCAA Football," Plaintiff asserts that consumers may
16 access online services to download team rosters and the athletes'
17 names, and upload them into the games. Plaintiff claims that, in
18 recent iterations, EA has included features that facilitate the
19 upload of this information.

20 Plaintiff alleges that EA uses his likeness without his
21 consent. He asserts that NCAA, an unincorporated association based
22 in Indiana, and CLC, a Georgia corporation headquartered in
23 Atlanta, facilitated this use. Plaintiff claims that EA, NCAA and
24 CLC met at NCAA's Indiana headquarters and EA's California
25 headquarters to negotiate the agreements that underlie the alleged
26 misconduct.

27 Plaintiff alleges other misconduct by NCAA and CLC, related to
28 NCAA's amateurism rules. Plaintiff maintains that NCAA's approval

1 of EA's games violates NCAA's "duty to NCAA athletes to honor its
2 own rules prohibiting the use of student likenesses"
3 Compl. ¶ 15. He cites NCAA Bylaw 12.5, which prohibits the
4 commercial licensing of the "name, picture or likeness" of athletes
5 at NCAA-member institutions. Compl. ¶ 13. Plaintiff asserts that
6 CLC must honor NCAA's prohibitions on the use of student
7 likenesses.

8 Plaintiff charges NCAA with violations of Indiana's right of
9 publicity statute, civil conspiracy and breach of contract. He
10 charges CLC with civil conspiracy and unjust enrichment. Against
11 EA, he pleads claims for violations of California's statutory and
12 common law rights of publicity, civil conspiracy, violation of
13 California's Unfair Competition Law and unjust enrichment. He
14 intends to move to certify his case as a class action and seeks,
15 among other things, damages and an injunction prohibiting the
16 future use of his and putative class members' likenesses.

17 LEGAL STANDARD

18 A complaint must contain a "short and plain statement of the
19 claim showing that the pleader is entitled to relief." Fed. R.
20 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
21 claim is appropriate only when the complaint does not give the
22 defendant fair notice of a legally cognizable claim and the grounds
23 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
24 (2007). In considering whether the complaint is sufficient to
25 state a claim, the court will take all material allegations as true
26 and construe them in the light most favorable to the plaintiff. NL
27 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
28 However, this principle is inapplicable to legal conclusions;

"threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

DISCUSSION

I. Indiana Right of Publicity Claim

Plaintiff alleges that NCAA violated his Indiana right of publicity. He argues that Indiana law applies to NCAA because its headquarters are located in Indiana and the alleged violation occurred in Indiana. NCAA argues that Plaintiff's claim fails as a matter of law because he does not allege that it used his image or likeness. Plaintiff responds that NCAA used his likeness because it "expressly reviewed and knowingly approved each version of each NCAA-brand videogame" Opp'n to NCAA's Mot. to Dismiss at 4.

Under Indiana law, personalities have a property interest in, among other things, their images and likenesses. Ind. Code § 32-36-1-7. A personality is a living or deceased person whose image and likeness have commercial value. Id. § 32-36-1-6. Indiana Code section 32-36-1-8 provides,

A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person

(emphasis added).

Although the parties do not offer controlling authority on this point, the plain language of the statute favors NCAA's position. Plaintiff argues that NCAA's liability under Indiana law

arises from its knowing approval of EA's use of his likeness. This interpretation expands liability under the Indiana statute to include persons who enable right of publicity violations. However, Plaintiff does not offer any authority to show that section 32-36-1-8 encompasses this type of misconduct. The Court declines to adopt Plaintiff's interpretation.

Plaintiff makes a related argument that NCAA should be held liable under Indiana's right of publicity statute as a co-conspirator of EA, which used his likeness. He cites cases that provide that co-conspirators can be held liable as joint tortfeasors for damages caused by another co-conspirator. See, e.g., Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 511 (1994); Boyle v. Anderson Fire Fighters Ass'n Local 1262, 497 N.E.2d 1073, 1079 (Ind. Ct. App. 1986). However, these cases are inapposite because Plaintiff has not alleged that either EA or CLC, NCAA's alleged co-conspirators, violated Indiana's right of publicity statute.

Plaintiff's Indiana right of publicity claim against NCAA is dismissed with leave to amend to allege that NCAA used his likeness or conspired with others to violate his right of publicity under Indiana law.

II. California Right of Publicity Claims

California's right of publicity statute provides,

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

1 Cal. Civ. Code § 3344(a). The statutory right of publicity
2 complements the common law right of publicity, which arises from
3 the misappropriation tort derived from the law of privacy. See
4 Comedy III Prods., Inc. v. Saderup, 25 Cal. 4th 387, 391 (2001).
5 To state a claim under California common law, a plaintiff must
6 allege "(1) the defendant's use of the plaintiff's identity;
7 (2) the appropriation of plaintiff's name or likeness to
8 defendant's advantage, commercially or otherwise; (3) lack of
9 consent; and (4) resulting injury.'" Hilton v. Hallmark Cards, 580
10 F.3d 874, 889 (9th Cir. 2009) (quoting Downing v. Abercrombie &
11 Fitch, 265 F.3d 994, 1001 (9th Cir. 2001)). Although the statutory
12 and common law rights are similar, there are differences. For
13 example, to state a claim under section 3344, a plaintiff must
14 prove knowing use in addition to satisfying the elements of a
15 common law claim. Kirby v. Sega of Am., Inc., 144 Cal. App. 4th
16 47, 55 (2006).

17 EA does not contest the sufficiency of Plaintiff's claims. It
18 asserts, however, that his right of publicity claims are barred by
19 the First Amendment and California law. The Court considers and
20 rejects each of these defenses in turn.

21 A. Transformative Use Defense¹

22 A defendant may raise an affirmative defense that the
23 challenged work is "protected by the First Amendment inasmuch as it
24 contains significant transformative elements or that the value of
25

26
27 ¹ Amici invite the Court to adopt another standard to assess
28 right of publicity claims. Because the Court finds that the
transformative test is sufficient for the purposes of this motion,
it does not address amici's arguments.

1 the work does not derive primarily from the celebrity's fame."
2 Hilton, 580 F.3d at 889 (quoting Comedy III, 25 Cal. 4th at 407)
3 (internal quotation marks omitted). The defense "poses what is
4 essentially a balancing test between the First Amendment and the
5 right of publicity." Hilton, 580 F.3d at 889 (quoting Winter v. DC
6 Comics, 30 Cal. 4th 881, 885 (2003)) (internal quotation marks
7 omitted).

8 To determine whether a work is transformative, a court must
9 inquire into

10 whether the celebrity likeness is one of the
11 "raw materials" from which an original work is
12 synthesized, or whether the depiction or
13 imitation of the celebrity is the very sum and
14 substance of the work in question. We ask, in
15 other words, whether a product containing a
16 celebrity's likeness is so transformed that it
17 has become primarily the defendant's own
18 expression rather than the celebrity's
19 likeness. And when we use the word
20 "expression," we mean expression of something
21 other than the likeness of the celebrity.

22 Comedy III, 25 Cal. 4th at 406. "An artist depicting a celebrity
23 must contribute something more than a merely trivial variation, but
24 create something recognizably his own, in order to qualify for
25 legal protection." Winter, 30 Cal. 4th at 888 (quoting Comedy III,
26 25 Cal. 4th at 408) (internal quotation and editing marks omitted).
27 The analysis "simply requires the court to examine and compare the
28 allegedly expressive work with the images of the plaintiff to
discern if the defendant's work contributes significantly
distinctive and expressive content." Kirby, 144 Cal. App. 4th at
61. "If distinctions exist, the First Amendment bars claims based
on appropriation of the plaintiff's identity or likeness; if not,
the claims are not barred." Id.

1 Two California Supreme Court cases "bookend the spectrum" used
2 to measure a work's transformative nature. Hilton, 580 F.3d at
3 890-91. On one end, Comedy III provides an example of a non-
4 transformative work. There, the defendant's "literal, conventional
5 depictions of The Three Stooges," drawn in charcoal and printed on
6 tee-shirts, did not contain transformative elements that warranted
7 protection by the First Amendment. Comedy III, 25 Cal. 4th at 409.
8 Interpreting Comedy III, the Ninth Circuit stated that "it is clear
9 that merely merchandising a celebrity's image without that person's
10 consent . . . does not amount to a transformative use." Hilton,
11 580 F.3d at 890.

12 Winter offers the opposite bookend. There, a comic book
13 publisher depicted two musicians, Johnny and Edgar Winter, as half-
14 human, half-worm cartoon characters. Winter, 30 Cal. 4th at 890.
15 The court affirmed summary judgment in favor of the defendant,
16 holding that the images were sufficiently transformative. The
17 court stated,

18 Although the fictional characters Johnny and
19 Edgar Autumn are less-than-subtle evocations of
20 Johnny and Edgar Winter, the books do not
21 depict plaintiffs literally. Instead,
22 plaintiffs are merely part of the raw materials
23 from which the comic books were synthesized.

24 Id.

25 Using Comedy III and Winter as guideposts, Kirby applied the
26 transformative use analysis to a video game. There, the court held
27 that the main character in the defendant's video game was
28 transformed. The plaintiff was a musician and dancer, known for
saying the phrase "ooh la la." Kirby, 144 Cal. App. 4th at 50-51.
Ulala, the main character in the defendant's game, worked as a news

1 reporter in the twenty-fifth century, "dispatched to investigate an
2 invasion of Earth." Id. at 52. Although there were similarities
3 between the two, the court held Ulala to be "more than a mere
4 likeness or literal depiction of Kirby." Id. at 59. "Ulala
5 contains sufficient expressive content to constitute a
6 'transformative work' under the test articulated by the
7 [California] Supreme Court." Id. In particular, Ulala was
8 extremely tall and wore clothing that differed from the plaintiff's
9 and the setting for the game was unlike any in which she had
10 appeared. Id.

11 Here, EA's depiction of Plaintiff in "NCAA Football" is not
12 sufficiently transformative to bar his California right of
13 publicity claims as a matter of law.² In the game, the quarterback
14 for Arizona State University shares many of Plaintiff's

16 ² EA asks the Court to take judicial notice of the content of
17 the video games "NCAA Football 2006" through "NCAA Football 2009,"
18 "NCAA March Madness 2006" through "NCAA March Madness 2008," and
19 "NCAA Basketball 2009;" paragraphs four of the Strauser and O'Brien
20 Declarations summarizing the content of these video games; various
21 press releases announcing the release date of the video games; a
22 United States Copyright Office document indicating the date of
23 first publication for "NCAA March Madness 2007;" an August 15, 2008
24 order from Kent v. Universal Studios, Inc., Case No. 08-2704 (C.D.
25 Cal.); and the content of the CBSSports.com Fantasy College
26 Football game. (Docket No. 36.) Generally, in ruling on a motion
27 to dismiss, a court cannot consider material outside of the
28 complaint. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994),
overruled on other grounds in Galbraith v. County of Santa Clara,
307 F.3d 1119, 1127 (9th Cir. 2002). However, a court may consider
exhibits submitted with the complaint and those documents "whose
contents are alleged in a complaint and whose authenticity no party
questions, but which are not physically attached to the pleading."
Id. at 453-54.

Because Plaintiff refers to the video games in his complaint,
the Court GRANTS EA's request for judicial notice of them.
Plaintiff does not mention the press releases or other materials
proffered by EA. Therefore, the Court DENIES EA's request as to
the other materials.

1 characteristics. For example, the virtual player wears the same
2 jersey number, is the same height and weight and hails from the
3 same state. EA's depiction of Plaintiff is far from the
4 transmogrification of the Winter brothers. EA does not depict
5 Plaintiff in a different form; he is represented as he what he was:
6 the starting quarterback for Arizona State University. Further,
7 unlike in Kirby, the game's setting is identical to where the
8 public found Plaintiff during his collegiate career: on the
9 football field.

10 EA asserts that the video game, taken as a whole, contains
11 transformative elements. However, the broad view EA asks the Court
12 to take is not supported by precedent. In Winter, the court
13 focused on the depictions of the plaintiffs, not the content of the
14 other portions of the comic book. The court in Kirby did the same:
15 it compared Ulala with the plaintiff; its analysis did not extend
16 beyond the game's elements unrelated to Ulala. These cases show
17 that this Court's focus must be on the depiction of Plaintiff in
18 "NCAA Football," not the game's other elements.

19 Accordingly, at this stage, EA's transformative use defense
20 fails.

21 B. Public Interest Defense

22 "Under California law, 'no cause of action will lie for the
23 publication of matters in the public interest, which rests on the
24 right of the public to know and the freedom of the press to tell
25 it.'" Hilton, 580 F.3d at 892 (quoting Montana v. San Jose Mercury
26 News, Inc., 34 Cal. App. 4th 790, 793 (1995)). "'Public interest
27 attaches to people who by their accomplishments or mode of living
28 create a bona fide attention to their activities.'" Hilton, 580

1 F.3d at 892 (quoting Dora v. Frontline Video, Inc., 15 Cal. App.
2 4th 536, 542 (1993)).

3 In Gionfriddo v. Major League Baseball, the court held that
4 the defendants were entitled to the public interest defense. 94
5 Cal. App. 4th 400, 415 (2001). There, the plaintiffs, four former
6 baseball players, claimed that the defendants' use of their names
7 and statistics violated their rights of publicity. Id. at 405-07.
8 Their information appeared on a website, which reported historical
9 team rosters and listed names of players who won awards during each
10 season. Id. at 406. The defendants also included still
11 photographs of the plaintiffs from their playing days in video
12 documentaries. Id. The court characterized these uses as "simply
13 making historical facts available to the public through game
14 programs, Web sites and video clips." Id. at 411. Because the
15 public had an interest in the plaintiffs' athletic performance, the
16 First Amendment protected the "recitation and discussion of [their]
17 factual data." Id.

18 The public interest defense also applied in Montana. There,
19 the defendant newspaper sold posters containing reproductions of
20 newspaper pages reporting on the San Francisco 49ers' win in the
21 1990 Super Bowl; these pages contained images of the plaintiff. 34
22 Cal. App. 4th at 792. The plaintiff conceded that the original
23 newspaper accounts were protected by the First Amendment, but
24 challenged their reproduction as posters. Id. at 794. The court
25 held that the posters were entitled to the same First Amendment
26 protection as the original news stories. The court stated,

27 Montana's name and likeness appeared in the posters
28 for precisely the same reason they appeared on the
original newspaper front pages: because Montana was

1 a major player in contemporaneous newsworthy sports
2 events. Under these circumstances, Montana's claim
3 that SJMN used his face and name solely to extract
4 the commercial value from them fails.

5 Id. (emphasis in original). Citing Montana, the Ninth Circuit
6 stated that the public interest defense "is about . . . publication
7 or reporting." Hilton, 580 F.3d at 892.

8 "NCAA Football" is unlike the works in Gionfriddo and Montana.
9 The game does not merely report or publish Plaintiff's statistics
10 and abilities. On the contrary, EA enables the consumer to assume
11 the identity of various student athletes and compete in simulated
12 college football matches. EA is correct that products created for
13 entertainment deserve constitutional protection. See, e.g.,
14 Gionfriddo, 94 Cal. App. 4th at 410 ("Entertainment features
15 receive the same constitutional protection as factual news
16 reports."). But it does not follow that these protections are
17 absolute and always trump the right of publicity.

18 EA cites cases in which courts held that the public interest
19 exception protected online fantasy baseball and football games.
20 Although these games are more analogous to "NCAA Football," the
21 cases are nonetheless distinguishable. In C.B.C. Distribution and
22 Marketing v. Major League Baseball Advanced Media, a declaratory
23 judgment action, the plaintiff sold "fantasy baseball products"
24 that included the names and statistics of major league baseball
25 players. 505 F.3d 818, 820-21 (8th Cir. 2007). Through these
26 products, consumers could form fantasy baseball teams and compete
27 with other users. Id. at 820. "A participant's success . . .
28 depend[ed] on the actual performance of the fantasy team's players
on their respective actual teams during the course of the major

1 league baseball season." Id. at 820-21. The defendant
2 counterclaimed, arguing that these products violated players'
3 rights of publicity. The court disagreed. It analogized the case
4 to Gionfriddo, and held that the use of the players' information in
5 the fantasy game was a "'recitation and discussion'" of the
6 players' information. Id. at 823-24 (quoting Gionfriddo, 94 Cal.
7 App. 4th at 411).

8 C.B.C. Distribution is inapplicable here. Success in "NCAA
9 Football" does not depend on updated reports of the real-life
10 players' progress during the college football season. Further,
11 EA's game provides more than just the players' names and
12 statistics; it offers a depiction of the student athletes' physical
13 characteristics and, as noted, enables consumers to control the
14 virtual players on a simulated football field. EA's use of
15 Plaintiff's likeness goes far beyond what the court considered in
16 C.B.C. Distribution.

17 EA is not entitled to the public interest defense on this
18 motion.

19 C. Section 3344(d) Exemption

20 California Civil Code section 3344(d) provides a public
21 affairs exemption to the statutory right of publicity. It exempts
22 from liability under section 3344 "a use of a name . . . or
23 likeness in connection with any news, public affairs, or sports
24 broadcast or account, or any political campaign." Cal. Civ. Code
25 § 3344(d). This exemption is not coextensive with the public
26 interest defense; it "is designed to avoid First Amendment
27 questions in the area of misappropriation by providing extra
28 breathing space for the use of a person's name in connection with

1 matters of public interest." New Kids on the Block v. News Am.
2 Pub., Inc., 971 F.2d 302, 310 n.10 (9th Cir. 1992) (citing Eastwood
3 v. Superior Court, 149 Cal. App. 3d 409, 421 (1983)).

4 In Dora v. Frontline Video, Inc., a California court held that
5 section 3344(d) barred a plaintiff's statutory right of publicity
6 claim. 15 Cal. App. 4th at 546. The defendant's documentary on
7 surfing contained, among other things, the plaintiff's name and
8 likeness. Id. at 540. The court held that this use was exempted
9 by section 3344(d) because the plaintiff's name and likeness were
10 used in connection with public affairs. In doing so, the court
11 addressed the meaning of "public affairs." The court distinguished
12 "public affairs" from "news," stating that "'public affairs' was
13 intended to mean something less important than news." Dora, 15
14 Cal. App. 4th at 545. Thus, the subject matter encompassed by
15 public affairs is not limited "to topics that might be covered on
16 public television or public radio." Id. at 546.

17 Here, Plaintiff does not dispute EA's contention that college
18 athletics are "public affairs." He asserts, however, that
19 section 3344(d) only applies to factual reporting.³ In essence, he
20 asserts that section 3344(d) applies to the same type of
21 "reporting" as does the public interest defense.

22 Neither party offered direct authority on the type of use for
23 which the section 3344(d) exemption applies. However, Montana is

24
25 ³ EA understands Plaintiff to argue that reporting implicates
26 newsworthy information. So interpreted, EA claims, Plaintiff's
27 argument must fail because Dora draws a distinction between "news"
28 and "public affairs." The Court does not construe Plaintiff's
argument in the same way. Instead, the Court reads Plaintiff to
argue that "NCAA Football" does not constitute "reporting" and, as
a result, EA does not use his name and likeness in a manner that is
exempted by section 3344(d).

1 instructive. There, the court stated that "the statutory cause of
2 action specifically exempts from liability the use of a name or
3 likeness in connection with the reporting of a matter in the public
4 interest." 34 Cal. App. 4th at 793 (emphasis added). Thus,
5 without authority requiring otherwise, the Court construes
6 section 3344(d) to require the same type of activity as the public
7 interest defense discussed above, namely reporting.⁴ Although
8 "NCAA Football" is based on subject matter considered "public
9 affairs," EA is not entitled to the statutory defense because its
10 use of Plaintiff's image and likeness extends beyond reporting
11 information about him.

12 Accordingly, Plaintiff's California statutory and common law
13 right of publicity claims are not barred as a matter of law.

14 III. Civil Conspiracy Claims

15 Defendants move separately to dismiss Plaintiff's civil
16 conspiracy claims. All challenge the sufficiency of Plaintiff's
17 claims, arguing that he does not plead an underlying tort, which is
18 a necessary element. CLC separately asserts the agent immunity
19 defense.

20 Plaintiff did not specify the state law under which his civil
21 conspiracy claims arise. For the purposes of this motion, the
22 Court assumes that his claims arise under California law.

23 A. Sufficiency of the Claims

24 Civil conspiracy "is not a cause of action, but a legal
25

26 ⁴ Although section 3344(d) and the public interest defense
27 implicate the same type of activity, they are nonetheless not
28 coextensive because section 3344(d) defines safe harbors for
reporting in particular contexts. See New Kids on the Block, 971
F.2d at 310 n.10.

1 doctrine that imposes liability on persons who, although not
2 actually committing a tort themselves, share with the immediate
3 tortfeasors a common plan or design in its perpetration." Applied
4 Equipment Corp., 7 Cal. 4th at 510 (citing Wyatt v. Union Mortgage
5 Co., 24 Cal. 3d 773, 784 (1979)). "Standing alone, a conspiracy
6 does no harm and engenders no tort liability. It must be activated
7 by the commission of an actual tort." Applied Equipment Corp., 7
8 Cal. 4th at 511.

9 A claim for civil conspiracy consists of three elements:
10 "(1) the formation and operation of the conspiracy, (2) wrongful
11 conduct in furtherance of the conspiracy, and (3) damages arising
12 from the wrongful conduct." Kidron v. Movie Acquisition Corp., 40
13 Cal. App. 4th 1571, 1581 (1995). "The conspiring defendants must
14 . . . have actual knowledge that a tort is planned and concur in
15 the tortious scheme with knowledge of its unlawful purpose." Id.
16 at 1582 (citing Wyatt, 24 Cal. 3d at 784-86). This knowledge must
17 be combined with an intent to aid in achieving the objective of the
18 conspiracy. Kidron, 40 Cal. App. 4th at 1582; Schick v. Bach, 193
19 Cal. App. 3d 1321, 1328 (1987). A claim of unlawful conspiracy
20 must contain "enough fact to raise a reasonable expectation that
21 discovery will reveal evidence of illegal agreement." Twombly, 550
22 U.S. at 556. A bare allegation that a conspiracy existed does not
23 suffice. Id.

24 Plaintiff alleges that there were meetings among Defendants in
25 California and Indiana. Compl. ¶¶ 54-56. He asserts that
26 Defendants knew of NCAA principles barring the licensing of
27 student-athlete identities, but nonetheless approved EA's games
28 containing the athletes' likenesses without their consent. Compl.

¶¶ 12-15. Finally, he claims that EA's actions violated his California statutory and common law rights of publicity.⁵ These factual allegations sufficiently support liability under Plaintiff's civil conspiracy claim.⁶

B. CLC's Agent Immunity Defense

CLC maintains that the agent immunity defense bars Plaintiff's conspiracy claim against it. This defense provides that no liability shall lie "if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty." Doctors' Co. v. Superior Court, 49 Cal. 3d 39, 44 (1989).

CLC maintains that Plaintiff's allegations that its role as a licensing company entering into agreements on behalf of NCAA establishes, as a matter of law, that it is NCAA's agent. These allegations are not sufficient at this early stage to establish CLC's entitlement to this defense.

⁵ Plaintiff alleges that Defendants conspired to deprive "class members of their right to protect their names, likenesses and rights to publicity and their contractual, property rights." Compl. ¶ 80. For the purposes of this motion, the Court construes this allegation to refer to EA's alleged violation of Plaintiff's California right of publicity because he does not state a claim based on the tortious conduct of any other Defendant.

⁶ Citing Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI, 100 Cal. App. 4th 1102 (2002), CLC also argues that it cannot accrue tort liability under a civil conspiracy theory because Plaintiff has not alleged that it can make video games. This argument is unavailing. Everest Investors 8 states that "tort liability from a conspiracy presupposes that the conspirator is legally capable of committing the tort -- that he owes a duty to the plaintiff recognized by law and is potentially subject to liability for the breach of that duty." Id. at 1106. Nothing in the record indicates that CLC is legally incapable of violating Plaintiff's rights of publicity.

1 IV. Section 17200 Claim

2 EA maintains that Plaintiff fails to state a claim under
3 California Business and Professions Code section 17200 because he
4 does not allege an underlying wrong or seek available relief.
5 However, as discussed above, Plaintiff sufficiently asserts right
6 of publicity and civil conspiracy claims. With regard to relief,
7 he seeks an injunction, which EA concedes is available under
8 section 17200. Thus, Plaintiff has stated a section 17200 claim
9 against EA.

10 V. Breach of Contract Claim

11 NCAA argues that Plaintiff does not state a breach of contract
12 claim because he has not identified an enforceable contract.
13 Because Plaintiff does not specify the state law under which his
14 claim arises, the Court assumes that California law applies.

15 To assert a cause of action for breach of contract in
16 California, a plaintiff must plead: (1) existence of a contract;
17 (2) the plaintiff's performance or excuse for non-performance;
18 (3) the defendant's breach; and (4) damages to the plaintiff as a
19 result of the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil &
20 Gas Co., 116 Cal. App. 4th 1375, 1391 n.6 (2004).

21 Plaintiff has not identified a contract that he is seeking to
22 enforce. Although he refers to an NCAA document as a contract, he
23 does not attach the document to his complaint. Instead, he states
24 that by signing the document, the athletes agree that "they have
25 'read and understand' the NCAA's rules" and that "to the best of
26 [their] knowledge [they] have not violated any amateurism rules."
27 Compl. ¶ 14. These phrases, on their own, do not indicate that the
28 document is a contract. Plaintiff's breach of contract claim

1 against NCAA is dismissed with leave to amend to allege or attach
2 an enforceable contract.

3 VI. Unjust Enrichment Claims

4 Plaintiff claims that EA and CLC were unjustly enriched
5 through the sale of video games that use his likeness. EA and CLC
6 argue that his claim is barred because California law does not
7 provide a cause of action for unjust enrichment. Even if it did,
8 EA and CLC argue, Plaintiff's allegations regarding the existence
9 of a contract with NCAA would independently bar an unjust
10 enrichment claim.

11 California courts appear to be split on whether there is an
12 independent cause of action for unjust enrichment. Baggett v.
13 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007)
14 (applying California law). One view is that unjust enrichment is
15 not a cause of action, or even a remedy, but rather a general
16 principle, underlying various legal doctrines and remedies.
17 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In
18 McBride, the court construed a "purported" unjust enrichment claim
19 as a cause of action seeking restitution. Id. There are at least
20 two potential bases for a cause of action seeking restitution:
21 (1) an alternative to breach of contract damages when the parties
22 had a contract which was procured by fraud or is unenforceable for
23 some reason; and (2) where the defendant obtained a benefit from
24 the plaintiff by fraud, duress, conversion, or similar conduct and
25 the plaintiff chooses not to sue in tort but to seek restitution on
26 a quasi-contract theory. Id. at 388. In the latter case, the law
27 implies a contract, or quasi-contract, without regard to the
28 parties' intent, to avoid unjust enrichment. Id.

1 Another view is that a cause of action for unjust enrichment
2 exists and its elements are receipt of a benefit and unjust
3 retention of the benefit at the expense of another. Lectrodryer v.
4 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide
5 Savings v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

6 Even under the more restrictive analysis of McBride, Plaintiff
7 sufficiently pleads claims for restitution against EA and CLC on
8 the theory that they obtained a benefit from him through their
9 alleged wrongful conduct. His breach of contract claim against
10 NCAA does not bar these claims. Although EA and CLC correctly note
11 that the existence of such a contract could bar a restitutionary
12 claim against a contracting party, it is not clear that his alleged
13 contract with NCAA defined any rights between him and EA and CLC.
14 Cf. Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal., 94 Cal. App.
15 4th 151, 172 (2001) (holding that "as a matter of law, a
16 quasi-contract action for unjust enrichment does not lie where, as
17 here, express binding agreements exist and define the parties'
18 rights"). Thus, Plaintiff has adequately stated his unjust
19 enrichment claim for restitution against EA and CLC.

20 VII. EA's Anti-SLAPP Motion to Strike

21 Finally, EA moves under California Code of Civil Procedure
22 section 425.16 to strike all of Plaintiff's claims against it.
23 Section 425.16(b)(1), which addresses Strategic Lawsuits Against
24 Public Participation (SLAPP), provides,

25 A cause of action against a person arising from any act of
26 that person in furtherance of the person's right of petition
27 or free speech under the United States or California
28 Constitution in connection with a public issue shall be
subject to a special motion to strike, unless the court
determines that the plaintiff has established that there is a
probability that the plaintiff will prevail on the claim.

1 California anti-SLAPP motions are available to litigants proceeding
2 in federal court. Thomas v. Fry's Elecs., Inc., 400 F.3d 1206,
3 1206 (9th Cir. 2005). California courts analyze anti-SLAPP motions
4 in two steps. "First, the court decides whether the defendant has
5 made a threshold showing that the challenged cause of action is one
6 arising from protected activity." Equilon Enter. v. Consumer
7 Cause, Inc., 29 Cal. 4th 53, 67 (2002). Second, the court
8 "determines whether the plaintiff has demonstrated a probability of
9 prevailing on the claim." Id.

10 Assuming that the challenged causes of action arise from
11 protected activity, Plaintiff makes a sufficient showing of his
12 probability of success on the merits. EA incorrectly argues that
13 Plaintiff has a substantial burden to show probability of success.
14 It maintains that the Court must apply "the same standard governing
15 motions for summary judgment, nonsuit, or directed verdict." EA's
16 Mot. to Strike at 12. However, this standard does not apply in
17 federal court.

18 "At the second step of the anti-SLAPP inquiry, the required
19 probability that [a party] will prevail need not be high." Hilton,
20 580 F.3d at 888-89. The "statute does not bar a plaintiff from
21 litigating an action that arises out of the defendant's free speech
22 or petitioning; it subjects to potential dismissal only those
23 actions in which the plaintiff cannot state and substantiate a
24 legally sufficient claim." Id. at 888 (quoting Navellier v.
25 Sletten, 29 Cal. 4th 82, 93 (2002)) (quotation marks omitted). In
26 Thomas v. Fry's Electronics, the case that provides that anti-SLAPP
27 motions are available to litigants proceeding in federal court, the
28 court stated that "federal courts may not impose a heightened

pleading requirement in derogation of federal notice pleading rules." 400 F.3d at 1207; see also Empress LLC v. City & County of S.F., 419 F.3d 1052, 1056 (9th Cir. 2005) (holding that "a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require"); Verizon, Inc. v. Covad Commc'ns. Co., 377 F.3d 1081, 1091 (9th Cir. 2004) (holding that procedural "state laws are not used in federal court if to do so would result in a direct collision with a Federal Rule of Civil Procedure" and noting that federal courts have "accordingly refused to apply certain discovery-limiting provisions of the anti-SLAPP statute because they would conflict with Fed. R. Civ. P. 56").

Under Federal Rule of Civil Procedure 8, Plaintiff has sufficiently stated his claims against EA. Accordingly, the Court denies EA's special motion to strike Plaintiff's claims as a SLAPP.

CONCLUSION

For the foregoing reasons, the Court DENIES EA's Motion to Dismiss (Docket No. 34), GRANTS NCAA's Motion in part and DENIES it in part (Docket No. 48), DENIES CLC's Motion (Docket No. 47) and DENIES EA's Motion to Strike (Docket No. 35). Plaintiff's claims for violation of his Indiana right of publicity and breach of contract against NCAA are dismissed with leave to amend. In accordance with this Court's Order of January 15, 2010 on consolidation, Plaintiff has thirty days from the date of this Order to file a consolidated amended complaint. A case management conference is scheduled for April 27, 2010 at 2:00 p.m.

IT IS SO ORDERED.

Dated: February 8, 2010



CLAUDIA WILKEN
United States District Judge